(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
T H Agriculture & Nutrition Company, Inc.	)	CERCLA § 106(b) Petition No. 94-20
Petitioner	)	

[Decided September 5, 1996]

FINAL DECISION

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

T H AGRICULTURE & NUTRITION COMPANY, INC.

CERCLA § 106(b) Petition No. 94-20

FINAL DECISION

Decided September 5, 1996

Syllabus

T H Agriculture & Nutrition Company, Inc. ("THAN") petitioned the Agency pursuant to section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9606(b), for reimbursement of $1,752,673 in costs it incurred in connection with its compliance with a unilateral administrative order ("UAO") issued by U.S. EPA Region IV on March 30, 1992, requiring the cleanup of a site owned by THAN in Albany, Georgia. The soil at the site, a former pesticide formulation facility, was contaminated with organochlorine pesticides ("OC pesticides").

In 1989, the site was listed on the National Priorities List ("NPL") as a site requiring remedial action. During the remedial process, THAN approached the Region's Remedial Branch with a proposal to conduct an immediate removal action to eliminate the contaminated soil at the site: specifically, removing surface soils, *i.e.*, those to a depth of one foot, to a cleanup level that is not at issue here; and removing subsurface soils, *i.e.*, those more than one foot below the surface, but only in isolated "hot spots" and to a cleanup level of 50 ppm. THAN's proposal was based in part on computer modeling recommended by the Region for the purpose of characterizing soil contamination at the site for purposes of remedial actions.

The Region's Removal Branch eventually assumed responsibility for overseeing THAN's proposed removal. Upon receipt of THAN's proposal, the Region's On-Scene Coordinator ("OSC") surveyed cleanup levels used at other removal sites in the Region's jurisdiction where no further soil cleanup was contemplated. Based on the survey, the OSC determined that all subsurface soil with OC pesticide concentrations in excess of 100 ppm should be removed. The OSC submitted both his and THAN's proposals to the Agency for Toxic Substances and Disease Registry ("ATSDR") for review. ATSDR approved the Region's proposal, explaining that it would protect human health in the event the subsurface soil is later disturbed for activities such as laying utility pipes if the site is eventually used for industrial or

commercial purposes, or even for residential or day-care uses. ATSDR also noted that THAN's proposal was not supported by any data about OC pesticide concentrations in soil one to five feet below the surface. Soon after receiving ATSDR's review, the Region issued a UAO to THAN implementing the Region's proposal, with which THAN complied.

THAN's petition seeks reimbursement of the alleged difference between the cost of removing only the "hot spots," as THAN proposed, and the cost of removing all subsurface soil with OC pesticide concentrations in excess of 100 ppm, as the Region required. THAN claims that the administrative record does not support the selected response action because it does not show how the response action was selected. THAN argues that the OSC's survey notes regarding the other sites were not placed in the administrative record by the Region until after the instant petition had been filed, contrary to 40 C.F.R. § 300.825, and objects to the Region's attempt to rely upon these notes. THAN also claims that the ATSDR report fails to support the selected response action. In addition, THAN claims that the Region acted arbitrarily and capriciously by rejecting THAN's proposal.

Held: The petition for reimbursement is denied.

The OSC's survey notes are properly included in the administrative record. THAN mistakenly relies upon 40 C.F.R. § 300.825, which specifies circumstances for adding documents to an administrative record after the decision document selecting the response action has been signed. In the Board's opinion, the Region has reasonably interpreted a separate but related provision, section 300.820(b)(3), as implying that documents generated or received before a decision document is signed are not subject to section 300.825. Because the OSC's survey notes were generated before the decision document selecting the response action, the UAO, was signed, 40 C.F.R. § 300.825 does not preclude the addition of the notes to the administrative record. This interpretation of the regulations is also consistent with the general principles of administrative law, which allow an administrative record to be supplemented with documents relied upon by the decision-maker where the record is otherwise incomplete.

THAN's claim that the ATSDR report fails to support the selected response action is without merit. The record shows that the possibility of future residential and day-care uses for the site was not foreclosed at the relevant time period. The record also shows that the ATSDR report was reliable, even though ATSDR checked "remedial" instead of "removal" on the report form, and even though the report did not mention "hot spots."

THAN's argument that the Region failed to show that the surveyed cleanup levels were properly selected and that the surveyed sites were similar to THAN's overlooks the presumption to which the Region is entitled under the arbitrary and capricious standard that the Region's decision is correct, *Natural Resources Defense Counsel v. U.S. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993), and erroneously attempts to shift to the Region THAN's burden under the statute to show that the Region's decision is arbitrary. THAN has failed to meet its burden; it has not shown why the Region was in error in relying upon data used by the OSC or why the exclusion of some of those data (as THAN argues for) would have resulted in a less stringent cleanup level.

THAN failed to prove that the Region's decision not to accept a proposal based on the results of THAN's computer modeling was arbitrary and capricious. The Region considered the data but did not accept them for two reasons. First, at the time the Region made its response selection, the data were preliminary and tentative and had not been through the rigorous approval procedures of the remedial process. Second, the data do not cover OC pesticide concentrations in the soil at depths between one and five feet below the surface.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

Pursuant to section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b), T H Agriculture & Nutrition Company, Inc. ("THAN") filed a petition for reimbursement of $1,752,673 it incurred in connection with its compliance with a unilateral administrative order[1] issued by U.S. EPA Region IV on March 30, 1992, requiring the cleanup of a site owned by THAN in Albany, Georgia. CERCLA provides that any person, including a

[1] *See infra* n.12.

liable party,[2] may recover its reasonable costs of complying with such an order "to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." 42 U.S.C. § 9606(b)(2)(D). The response action selected by the Region called for THAN to remove all soil at the site that exceeded certain specified levels of contamination by organochlorine pesticides ("OC pesticides"), specifically, 50 parts per million ("ppm") for surface soil (to a depth of one foot) and 100 ppm for subsurface soil (below one foot). Also, in response to the order, THAN regraded the surface of the site and replaced the removed soil with a 12-inch layer of clean compacted clay backfill and a 6-inch layer of topsoil seeded with a vegetative cover of a rye/bermuda grass mixture. THAN does not dispute the soil removal requirements to the extent they concern surface soil contamination. THAN's objection is to the subsurface soil requirement, mandating removal of all subsurface soil containing OC pesticide concentrations in excess of 100 ppm. According to THAN, the Region should have ordered THAN to remove the subsurface soil only in certain "hot spots" that contained threatening levels of OC pesticides.

At the Board's request, the Region responded to THAN's petition. Based on these and other submissions by the parties,[3] the Board issued a Preliminary Decision on July 2, 1996. THAN filed

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[2]THAN does not dispute that it is a responsible party who may be held liable for response costs under CERCLA § 107(a), 42 U.S.C. § 9607(a).

[3]In addition, THAN filed a reply to the Region's response, to which the Region replied. THAN then filed a reply to the Region's reply, which the Region answered by asking the Board not to consider THAN's most recent filing. Thereafter, THAN filed (without leave) an amendment to its petition for reimbursement. The Region filed a motion to dismiss THAN's proposed amendment. In the interests of having the full views of the parties on the record before us, we have considered all of the submissions filed in this matter.

comments on the Preliminary Decision on August 2, 1996, and the Region filed a response to those comments on August 15, 1996.[4] After due consideration of the comments received, and making such changes as it deemed appropriate,[5] the Board issues this Final Decision. *See* Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions at 10 (EAB, June 9, 1994).

I. BACKGROUND

A. Statutory Background

The essence of THAN's petition for reimbursement is that the "removal" action ordered by the Region, the excavation of subsurface soils with OC pesticide concentrations greater than 100 ppm, was arbitrary and capricious because it was more stringent than the excavation of certain "hot spots" suggested by results of computer modeling THAN utilized with the Region's permission during the course of "remedial" action for the site. To understand fully THAN's claim, it is first necessary to understand the different concepts of "removal" and "remedial" actions under CERCLA.

CERCLA authorizes two types of "responses" to actual or threatened releases of a hazardous substance into the environment:

[4]Attached to the Region's response to THAN's comments was a request to have the Board consider the response. The request is hereby granted over THAN's objection.

[5]Any argument not addressed herein is rejected as not sufficiently persuasive to warrant comment.

removal actions and remedial actions.[6] The statute defines a "remedy" or "remedial" action as an action "consistent with [a] permanent remedy." CERCLA § 101(24), 42 U.S.C. § 9601(24). It is "taken instead of, or in addition to removal actions * * * to prevent or minimize the release of a hazardous substance into the environment." *Id.* In contrast, "[t]he removal program is intended to address releases that pose a relatively near-term threat," 53 Fed. Reg. 51,394, 51,405 (Dec. 21, 1988), and the authority to conduct removal actions "is mainly used to respond to emergency and time-critical situations where long deliberation prior to response is not feasible." 55 Fed. Reg. 8,666, 8,695 (Mar. 8, 1990). A "removal" "means the cleanup or removal of released hazardous substances from the environment." CERCLA § 101(23), 42 U.S.C.§ 9601(23). "[R]emovals are distinct from remedial actions in that they may mitigate or stabilize the threat rather than comprehensively address all threats at a site." 55 Fed. Reg. 8,666, 8,695 (Mar. 8, 1990).

Because removals deal with the near-term, and remedies deal with the long-term, different procedures apply to each. Generally, the selection of a remedy takes longer than the selection of a removal, and involves more Agency deliberation and public participation.[7] Each is briefly summarized below.

Upon discovering a release or threat of a release that may present an imminent and substantial endangerment to human health,

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[6] *See* CERCLA § 101(25), 42 U.S.C. § 9601(25) (defining "response" as "remove, removal, remedy and remedial action"); CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (authorizing the President "to remove or arrange for the removal of, and provide remedial action relating to such substance").

[7] *See* 53 Fed. Reg. at 51,463 ("Because the nature of removal actions often involves the need for prompt action, the procedures proposed today for public participation in removal actions are quite different from those for remedial actions.").

welfare or the environment, the Agency must determine whether circumstances implicate a removal or a remedial action. 40 C.F.R. § 300.405(f)(1) and (2). If a removal is implicated, the first step is the removal site evaluation under 40 C.F.R. § 300.410; if a remedy is implicated, the first step is the remedial site evaluation under 40 C.F.R. § 300.420. Both types of site evaluations include a preliminary assessment of available data and, if necessary, a site inspection. After the site evaluation, the removal and remedial processes vary significantly.

In the removal context, the next step after the site evaluation is the determination of whether a removal action is required, and if so, when the on-site work must commence. If it is not necessary to commence on-site work within six months from the determination that a removal is warranted, the removal is deemed "non-time critical."[8] In these circumstances, an engineering evaluation/cost analysis is performed to evaluate alternative removal actions, and made available for public comment. 40 C.F.R. § 300.415(n)(4). The removal action is selected after this process. If, however, it is necessary to commence on-site removal work within six months from determining that a removal is necessary, the removal is deemed "time-critical," and the availability of a public comment period on the removal action is within the discretion of the Agency; it is not guaranteed by regulation, owing to the exigencies that render the removal "time critical."[9] 40 C.F.R. §

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[8] *See infra* n.9.

[9] As explained more fully in *In re ASARCO Inc. and Federated Metals Corp.*, CERCLA § 106(b) Petition No. 94-22, slip op. at 15, n. 23 (EAB, Apr. 17, 1996), the terms "non-time critical" and "time critical" do not appear in Agency regulations. The Agency introduced these terms in OSWER Directive #9318.0-05 (April 13, 1987), as a short-hand way of distinguishing between removal actions for which it had determined that a planning period of at least six months exists before on-site activities must be initiated and removal actions for which such a lengthy planning period did not exist.

300.415(n)(2); *In re ASARCO Inc. and Federated Metals Corp.*, CERCLA § 106(b) Petition No. 94-22, slip op. at 21-22 (EAB, Apr. 17, 1996) (in time-critical removal actions, "public comment period is not required if deemed inappropriate" by the Agency).

In contrast, the selection of a remedy proceeds at a much slower pace, thus allowing more study and deliberation, and more participation by the public. If, after the site evaluation, the Agency determines that a remedial action is required, the next step is the completion of a remedial investigation/feasibility study ("RI/FS") pursuant to 40 C.F.R. § 300.430. The remedial investigation is:

> [A] process undertaken * * * to determine the nature and extent of the problem presented by the release. The RI emphasizes data collection and site characterization, and is generally performed concurrently and in an interactive fashion with the feasibility study. The RI includes sampling and monitoring, as necessary, and includes the gathering of sufficient information to determine the necessity for remedial action and to support the evaluation of remedial alternatives.

40 C.F.R. § 300.5. The feasibility study is:

> [A] study undertaken * * * to develop and evaluate options for remedial action. The FS emphasizes data analysis and is generally performed concurrently and in an interactive fashion with the remedial investigation (RI), using data gathered during the RI. The RI data are used to define the objectives of the response action, to develop remedial action alternatives, and to undertake an initial screened and detailed analysis of the alternatives.

Id. Based upon the RI/FS, a proposed remedy is selected by EPA. 40 C.F.R. § 300.430(f). This proposal is then made available for public comment. 40 C.F.R. § 300.430(f)(3). After consideration of any information received during the public comment period, the final remedy is selected by EPA and documented in the record of decision. 40 C.F.R. § 300.430(f)(4). The next step involves the actual design of the remedy selected in the record of decision. 40 C.F.R. § 300.435. Once the design is complete, a fact sheet is issued before the initiation of the remedy and, if appropriate, a public briefing is also held. 40 C.F.R. § 300.435(c)(3).

Despite these differences, remedial and removal actions may sometimes overlap. "It is important to note that [the] response to releases of hazardous substances does not follow a straight sequential path from discovery through removal to remedial action. * * * [I]n reality, a decision to conduct a removal may be made at any time in the remedial process * * *." 53 Fed. Reg. at 51,405. Removal actions should, to the extent practicable, "contribute to the efficient performance of any long term remedial action with respect to the release or threatened release concerned." CERCLA § 104(a)(2), 42 U.S.C. § 9604(a)(2).

B. Factual Background

The property involved here is located at 1401 and 1359 Schley Avenue on the north side of Albany, and consists of two former pesticide formulation facilities where various liquids and dry formulations of pesticides and other chemical compounds were handled for a period of approximately thirty years. The entire site is made up of two parcels: a seven-acre western parcel currently owned by THAN and a five-acre eastern parcel currently owned by Mr. Larry Jones, which contains an active welding supply store. The entire site is bounded on the east by residences, on the west by a railway line, on the north by a construction company, and on the south by Schley Avenue.

Record of Decision, T H Agriculture and Nutrition Site, Operable Unit One at 1 (May 21, 1993) ("ROD").

The petition for reimbursement involves only the western parcel owned by THAN.[10] Since the 1950's, this parcel was used as a formulation and packaging plant for agricultural chemicals. *Id.* THAN purchased the property in 1967, and business operations on the property ceased in 1982. *Id.* At the request of the Georgia Environmental Protection Division ("GEPD"), THAN began investigative studies of the property in the same year it ceased operations. Petitioner's Exhibit ("P. Ex.") No. 3 (Final Removal Action Report) at 1-4 (Feb. 10, 1994). Pursuant to a plan approved by the GEPD, THAN conducted a cleanup of the western parcel in 1984, which included the demolition of several buildings, installation of a perimeter fence, and establishment of vegetative cover. *Id.* The cleanup also involved excavation of surface soils and subsurface disposal areas to the satisfaction of the GEPD cleanup criteria. *Id.*

Despite the 1984 cleanup, EPA listed the entire site on the National Priorities List ("NPL") in 1989 as a site requiring a long-term remedial evaluation and response.[11] On July 6, 1990, THAN agreed to the entry by EPA of an Administrative Order by Consent,[12] providing

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[10]For ease of reference, we use the term "entire site" to refer to the property encompassing both the eastern and western parcels. Our use of the term "site" refers only to the western parcel owned by THAN, which is the only part of the entire site subject to the unilateral administrative order at issue.

[11]*See* 54 Fed. Reg. 41,015 (Oct. 4, 1989); 40 C.F.R. Part 300 App. B, Table 1. The NPL is the "list, compiled by EPA pursuant to CERCLA section 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response." 40 C.F.R. § 300.5.

[12]Under CERCLA § 106(a), the Agency may order any person to take such (continued...)

for the performance of an RI/FS for the parcel owned by THAN. The RI was conducted between December 1990 and January 1992. The results of the RI confirmed that OC pesticides were the constituents of concern in the soil and groundwater at the site.[13] P. Ex. No. 3 at 1-5. During the course of the RI, the Region IV Remedial Branch suggested to THAN that it evaluate two computer models, the Summers model and the PESTAN model,[14] for use in characterizing soil contamination at the site. P. Ex. No. 19 (Letter from Alan W. Yarbrough, Remedial Project Manager, Region IV to John P. Cleary, Project Manager, T H Agriculture and Nutrition Company, Inc. (July 31, 1991)). THAN responded by agreeing to evaluate the applicability of those models to determine subsurface soil clean-up levels. P. Ex. No. 6 (Technical Memorandum: Preliminary Remedial Action Objectives) at 5-1 (Jan. 1992).

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[12](...continued)
actions as may be necessary to protect public health and welfare and the environment. This would include orders to conduct a removal, a remedial investigation/feasibility study, a remedial design or a remedial action. If the recipient of such an order consents to the issuance of the order, the order is known as an "administrative order on consent." If the recipient does not consent to such an order, the order is issued unilaterally by the Agency, and is known as an "unilateral administrative order." *See* Mays, *CERCLA Enforcement Policy Manual* at 9-10 (1993).

[13]The particular organochlorine pesticides found in the soil were: toxaphene, 4,4' DDT, and its metabolites beta-BHC and alpha-BHC, and dieldrin. ROD at 8; P. Ex. No. 25 at 8.

[14]These models apply to different geological and hydrological situations. In essence, the Summers model applies in areas where contamination is present from the surface to the water table. In contrast, the PESTAN model applies in areas where the contaminant exists in a discrete layer above a buffer zone of clean soil overlying the water table. P. Ex. No. 19 (Letter from Alan W. Yarbrough, Remedial Project Manager, Region IV to John P. Cleary, Project Manager, T H Agriculture and Nutrition Company, Inc. (July 31, 1991)).

Upon completion of the soil characterization portion of the RI, and near the end of the RI/FS portion of the remedial activity at the site, THAN approached the Region IV Remedial Branch with a proposal to conduct an immediate removal action. At a meeting on February 14, 1992, THAN proposed removing contaminated soil and debris on the site.[15] P. Ex. No. 7 (Letter from James D. Levine, Counsel to THAN to Alan W. Yarbrough, Remedial Project Manager, Region IV) at 2 (Feb. 18, 1992).[16] THAN stated that this removal action would "*eliminate* the major ongoing contaminant source on the property." *Id.* at 2 (emphasis added). Specifically, THAN proposed to excavate and dispose of the surface soils on the property, that is, the soil to a depth of one foot, to achieve cleanup levels that are not contested by THAN and therefore not at issue here. *Id.* For soils below a depth of one foot, subsurface soils, THAN indicated that it would calculate cleanup levels based on the results of the computer modeling recommended by the Remedial Branch. *Id.* The proposal emphasized THAN's desire to perform this removal activity immediately, and in particular by May 1, 1992, instead of waiting for the remedial process to run its course.[17] THAN's desire to conduct an immediate removal

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[15]The soil and debris were one of two sources of contamination on the property identified during the RI, the other being non-aqueous phase liquids found above the water table. P. Ex. No. 7 (Letter from James D. Levine, Counsel to THAN to Alan W. Yarbrough, Remedial Project Manager, Region IV) at 2 (Feb. 18, 1992).

[16]This letter was sent to the Region to confirm the details of the February 14, 1992 meeting.

[17]At the time THAN made its proposal, it had not yet submitted the final RI to the Region, which it did on February 27, 1992. Nor had THAN submitted a FS to the Region, which it did on February 26, 1992. These documents were subject to Agency review and approval before the Agency issued a ROD containing the Agency's selection of a remedy for the site. *See* 40 C.F.R. § 300.415. In this case, the Region approved THAN's RI on June 11, 1992. It approved the FS on September 23, 1992.

(continued...)

of the contaminated soil and debris was attributable to the schedule d May 8, 1992 expiration of the national capacity variance for soil an d debris contaminated with so-called "third third" h azardous wastes.[18] *See* P. Ex. No. 7 at 5. At the time THAN proposed the removal activity, contaminated soil and debris could be disposed of in an approve d hazardous waste landfill pursuant to a national capacity variance. After the expiration of the national capacity variance, the landfilling of such materials was prohibited, requiring other, presumably more expensive, methods of disposal.

THAN proposed performing the removal activity under EPA oversight pursuant to a consent order.[19] The Region IV Remedial Branch responded to this proposal on March 3, 1992. *See* P. Ex. No. 8 (Letter from Alan W. Yarbrough, Remedial Project Manager, Region IV to John P. Cleary, Project Manager, T H Agriculture and Nutrition

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[17](...continued)
The ROD was issued on May 21, 1993.

[18]The Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act phased in a prohibition on the land disposal of untreated hazardous wastes. The statute directed EPA to rank, based upon intrinsic hazard and volume, all hazardous wastes. RCRA § 3304(g), 42 U.S.C. § 6924(g). The statute established a schedule for the Agency to consider this list of ranked hazardous wastes, one-third at a time, to determine whether to prohibit the land disposal of the wastes if the waste had not been treated in accordance with standards, issued by the Agency, for assuring safe land disposal. *Id.* Land disposal restrictions for the first third of the list (40 C.F.R. § 268.10) were issued in 1988 (40 C.F.R. § 268.33), for the second third (40 C.F.R. § 268.11) in 1989 (40 C.F.R. § 268.34), and for the third third (40 C.F.R. § 268.12) in 1990 (40 C.F.R. § 268.35). In the event that adequate treatment, recovery or disposal capacity was not available for hazardous wastes prohibited from land disposal, the statute authorized the Agency to grant an extension, not to exceed two years, of the date upon which land disposal prohibition became effective. RCRA § 3004(h), 42 U.S.C. § 6924(h). These extensions are known as "national capacity variances."

[19]*See supra* n.12.

Company, Inc. (Mar. 3, 1992)). With respect to the proposed cleanup levels for subsurface soils, the Remedial Branch expressed this concern:

> Cleanup standards arrived at using the PESTAN and Summers models are site-specific; the cleanup standards for this Site have not been determined or proposed by EPA since the draft FS has not yet been reviewed. Therefore, the final cleanup standards for this Site will not be determined when this removal begins. Such standards will not be determined until the final ROD for this Site is signed by EPA.

Id. at 2. Assuming that this concern would be resolved, the Remedial Branch expressed conditional approval of THAN's proposal. One of the caveats the Remedial Branch placed on its approval was that:

> The removal action is being done at THAN's risk. No guarantee is being granted from EPA that the removal cleanup levels will correlate with the remedial cleanup levels since such remedial cleanup standards will not be determined until a ROD is signed concerning the soils operable unit for this Site.

Id. at 2-3. THAN apparently construed this warning as meaning that the remedial cleanup levels might be *more*, not *less*, stringent than the level selected for the removal. *See* Petition for Reimbursement of Costs at 9 (THAN "acknowledged EPA's position with respect to the possibility that the remedial cleanup levels could ultimately be more stringent than the levels [THAN] had proposed for the removal action."). As discussed later, THAN failed to recognize that the warning applied equally to the opposite possibility, *i.e.*, that the remedial cleanup level might be less stringent that the removal cleanup level.

Attached to the Remedial Branch's approval was a draft consent order for the removal project. The proposed consent order did not contain any specific cleanup levels for the soil removal. Instead, it indicated that THAN would have to submit a work plan for the removal activity, and that the work plan would have to include proposed cleanup levels. *Id.* In its comments on the draft consent order, THAN stated that it "understands that EPA provides no guarantee that the [remedial action] cleanup standards will not be more stringent than the removal action cleanup standards." P. Ex. No. 9 (Letter from Edwin Williamson, Counsel to THAN to Paul Schwartz, Assistant Regional Counsel, Region IV) at 4 (Mar. 13, 1992). THAN's comments did not propose any specific cleanup levels.

Even though a consent order had not yet been signed, THAN submitted a draft removal action work plan to the Region on March 17, 1992. With respect to subsurface soils, the draft work plan referred to the results of THAN's utilization of the PESTAN and Summers computer models:

> The [modeling] results indicated that the chemicals of concern generally found in the subsurface soils are characteristically insoluble, are at low concentrations, exist in very low permeability soil, and therefore, are not being leached into groundwater. However, there are areas of subsurface soils that contain higher concentrations of the chemicals of concern (hot spots).

P. Ex. No. 10 (Preliminary Draft Removal Action Work Plan) at 1-2 (Mar. 1992). As the expiration date of the national capacity variance loomed closer, THAN proposed excavating the subsurface soil only in those areas it termed "hot spots," that is, portions of the site where sampling "indicated high concentrations" of the chemicals of concern. *Id.* Specifically, THAN proposed excavating these "hot spots" "until the concentration of total organochlorine pesticides remaining is less

than 50 ppm." *Id.* With respect to the remaining subsurface soil at the site, THAN stated that no removal action was necessary because th e computer modeling indicated that the chemi cals of concern were at low concentrations and were not leaching into the groundwater.

Because the activity proposed by THAN was a removal action, the Region's Removal Branch eventually assumed ove rsight of THAN's proposal from the Region's Remedial Branch. The Removal Branc h determined that the removal action was time-critical.[20] Upon receipt of THAN's draft removal action work plan, the On-Scene Coordinator ("OSC")[21] surveyed the cleanup levels used at other similar sites within

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[20]As explained in the Region's response to THAN's comments on the Preliminary Decision, this was an implicit rather than an explicit time-critical determination:

> EPA made no express finding that the removal action was time-critical, [but] that finding is implicit in the process followed by EPA and in the timing of work required by the Order. * * * EPA's order contemplated and resulted in the commencement of on-site work in less than six months. Moreover, [THAN] had indicated to EPA that it would commence on-site work in less than six months with or without EPA oversight in order to dispose of removed material in a landfill before a national capacity variance from land disposal restrictions expired. Had EPA characterized this action as non-time critical, the procedural requirements that would have been imposed would likely have prevented [THAN] from beating the national capacity variance expiration date, resulting in a substantial increase in costs to [THAN].

Response to Petitioner's Comments on Preliminary Decision at 6-7. *See also infra* n. 36.

[21]The On-Scene Coordinator is the "government official designated by the [Agency] to coordinate and direct removal actions under subpart E of the [National Contingency Plan]." 40 C.F.R. § 300.5. The OSC is a member of the Region's Removal Branch.

the Region. According to the Region, this survey revealed that 10 0 ppm is an appropriate cleanup level for subsurface soil contaminate d with OC pesticides.[22]

After this survey, the OSC requested an evaluation of THAN's proposed cleanup standards by the Agency for Toxic Substances an d Disease Registry ("ATSDR").[23] The request repeated THAN's proposal for the surface and subsurface soil cleanup. In particular, the reques t explained that THAN proposed excavating "hot spots" "wher e significant contamination was found in deeper soil samples (5 to 7 feet [below land surface] and deeper)." The request also explained "that no data is available on the one foot to fi ve foot below land surface (bls) soil interval." P. Ex. No. 23 (Memorandum from Don Rigger, OSC , Region IV to Robert Safay, Regional Representative, ATSDR (Mar. 17, 1992)). The request also set forth the Removal Branch's proposal fo r the soil cleanup:

> We have proposed removal action levels of 50 pp m total organochlorine pesticides for soils where a reasonable potential exists for direct contact wit h humans and 100 ppm organochlorine pesticides fo r subsurface soils.

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[22] *See* P. Ex. No. 13 (Letter from Douglas F. Mundrick, Chief, Remedial Branch, and Myron D. Lair, Chief, Removal Branch, Region IV to John P. Cleary, Project Manager, T H Agriculture and Nutrition Company, Inc.) at 3 (Apr. 27, 1992) discussed in the text *infra.*

[23] The ATSDR was established by CERCLA § 104(i), 42 U.S.C. § 9604(i). It is charged with effectuating and implementing the health-related authorities of CERCLA. CERCLA § 104(i)(1). As part of its duties, it "shall provide consultations upon request on health issues relating to exposure to hazardous or toxic substances." CERCLA § 104(i)(4).

Id.[24]

The critical difference between the two proposals rested in the areal extent of the removal activities, not in the different cleanup levels proposed by each (50 ppm by THAN and 100 ppm by the Region). THAN's proposal called for subsurface soil removal to occur only in selected areas previously identified as "hot spots" on the basis of samples obtained from depths below five feet. THAN would remove the soil in these areas to a cleanup level of 50 ppm for OC pesticides. It would not remove subsurface soil from other areas. The Region's proposal, on the other hand, required removal of contaminated subsurface soil wherever it was found with OC pesticide levels exceeding 100 ppm. Thus, because the area of soil subject to removal under the Region's proposal was potentially larger than under THAN's proposal, the Region's proposal also potentially required the removal of a larger volume of soil than under THAN's proposal. Based on information available following THAN's completion of the cleanup order, it appears that approximately 1,000 tons of subsurface soil required removal under THAN's proposal whereas approximately 9,413 tons required removal under the Region's proposal.[25] *See* P. Ex. No. 4 (Summary of Incremental Costs). The OSC requested comment from ATSDR on both proposals on March 17, 1992.

ATSDR responded to the Region's request on the next day. ATSDR approved the Region's cleanup proposal, but not THAN's, explaining:

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[24]Cleanup levels for surface soils "are usually more stringent than [those for] subsurface soils since a direct contact risk and inhalation risk exists for surface soils. Unless excavated, subsurface soils do not pose a direct contact threat." ROD at 51.

[25]The same amount of surface soil, 15,394 tons, required removal under both proposals. *See* P. Ex. No. 4 (Summary of Incremental Costs).

> ATSDR has reviewed the two proposed remediatio n plans for the site. ATSDR recommends sampling b e performed at the currently unsampled depth of 1 to 5 feet. Until [OC pesticide] concentrations at this soi l depth are known, ATSDR cannot determine whether [THAN's] remediation plan is protective of huma n health. In [the] future soil may be disturbed by suc h activities as construction onsite or laying utility line s throughout the site * * *. Then, unknow n concentrations of [OC pesticides] may be brought t o the surface for direct contact exposure. Onsit e workers could also be exposed to soil containin g unknown concentrations of [OC pesticides].
>
> The EPA proposed removal action levels would b e protective of human health for industrial use and most commercial uses. For residential use or commercia l use such as a children's da y care center, the 100 ppm in sub-surface soil (soil not coming into contact wit h people) would be protective of human health.

P. Ex. No. 24 (ATSDR Record of Activity) at 2 (Mar. 18, 1992).

The Region IV Removal Branch informed THAN by phon e that same day that it had selected a cleanup level of 100 ppm fo r subsurface soil, without regard to the "ho t spots." THAN immediately objected to this figure on the basis that it ignored the modeling results conducted at the suggestion and with the approval of the Remedia l Branch, and specifically the conclusion that only the identified "ho t spots" required a cleanup in order to protect human health and th e environment. P. Ex. No. 11 (Letter from James D. Levine, Counsel to THAN to Paul Schwartz, Assistant Regional C ounsel, Region IV (Mar. 18, 1992)). At a meeting with ATSDR and Removal Branc h representatives soon thereafter, THAN repeated these concerns. I n

defense of its selected cleanup level, the Removal Branch relied upo n the ATSDR concurrence and upon its experience with other simila r removal actions in the Region utilizing the same cleanup levels . Petition for Reimbursement of Costs at 11-12. Because THA N disagreed with the cleanup level selected b y the Region, THAN did not consent to the issuance of a removal cleanup order. Therefore, o n March 30, 1992, Region IV issued the unilateral administrative orde r directing THAN to excavate the surface and subsurface soils at the site to the cleanup levels the Removal Branch had selected for this action.

Shortly after commencing the removal action, THAN sent a letter to the Region detailing its contention that the cleanup level fo r subsurface soils was arbitrary, capricious and without justification. P. Ex. No. 12 (Letter from James D. Levine, Counsel to THAN to Greer C. Tidwell, Regional Administrator, Region IV) at 1 (Apr. 6, 1992). In particular, THAN objected to the Region's requir ement that it excavate all subsurface soils with concentrations of OC pesticides greater tha n 100 ppm. According to THAN, the Region's order "would require the removal of a much larger amount of soil than THAN had anticipated or that THAN believed was necessary pursuant to the various reports and technical memoranda that THAN had submitted to EPA as par t of the RI/FS and that EPA had approved." *Id.* at 4. THAN stated that the Region should have selected THA N's proposal to clean up the "hot spots" because that proposal was based upon the results of the RI/F S process to date.

The Region responded to THAN's objections on April 27 , 1992. The Region emphasized that when it issued the removal order, the RI/FS process had not been completed, and that no ROD had been issued for the site. Thus, the Region had made no final evaluations or approvals with respect to the computer modeling data submitted b y THAN during the RI/FS process and upon which THAN based it s proposed removal cleanup standards. The Regi on defended its selection of cleanup levels for the removal action:

> THAN has given every indication that the soil removal is intended to be a final remedy for soil contamination. In the absence of EPA approved remedial cleanup levels, the removal program established cleanup levels which are protective of public health, assuming that no further soil clean-up will take place at the Site. The OSC followed the normal procedure for setting cleanup levels. This involved a survey of past removal actions with similar contaminants and similar conditions. In this case, the OSC surveyed removals where the removal action was likely to be the only action taken at the site to mitigate the threat posed by direct contact with the soil. The OSC determined that 50 ppm surface and 100 ppm subsurface were acceptable cleanup criteria to mitigate the threat posed.* * *
>
> These levels were proposed to ATSDR in the form of a health consultation. In a health consultation, ATSDR reviews analytical data and site conditions and provides comments on the public health implications of an EPA proposed course of action. For the THAN site, ATSDR commented on the appropriateness of the removal action and gave it a conditional concurrence based on direct contact, inhalation, and ingestion exposure scenarios.

P. Ex. No. 13 (Letter from Douglas F. Mundrick, Chief, Remedial Branch, and Myron D. Lair, Chief, Removal Branch, Region IV to John P. Cleary, Project Manager, T H Agriculture and Nutrition Company, Inc.) at 3 (Apr. 27, 1992). In sum, the Region concluded:

> Because of the time constraints brought on by the expiration of the national capacity variance, THAN

> has attempted to obtain from EPA a premature determination of subsurface clean-up levels that will be established in the ROD. In effect, THAN has asked the [Remedial Branch] to forecast the ROD so that THAN can limit the cost of soil disposal. The [Remedial Branch] has refused to forecast the soil cleanup level, and the OSC is responsible for establishing a cleanup level for the removal which is protective. The OSC has acted in a manner wholly consistent with EPA policy in arriving at the cleanup level.

Id. at 3-4.

On May 21, 1993, while the removal action was in its second year of progress, the Region issued a ROD for the entire site. In particular, the ROD addressed soil contamination on the western portion owned by THAN and groundwater contamination throughout the eastern and western portions owned by Jones and THAN, respectively.[26] The Region selected no remedy for the soils on THAN's property, "because the removal action has fully addressed the threat posed by the contaminated soils." ROD at 41.[27] The ROD, however,

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[26]The ROD was specifically for "operable unit one," which it defined as "the source of contamination on the western parcel of the Site [the portion owned by THAN] as well as the principle [sic] threat of groundwater contamination across the entire Site." ROD Declaration. The "second operable unit will involve continued study and remediation of a second source of contamination on the eastern parcel of the Site [the portion owned by Jones]." *Id.* In other words, the soil contamination on the eastern portion of the site would be dealt with in a second ROD.

[27]As explained in the ROD, the modeling and investigations performed during the remedial investigation, "indicate that the subsurface soils on the western parcel would not contribute to groundwater contamination at concentrations exceeding the (continued...)

as part of the groundwater remediation activities, did require "institutional controls, such as deed and land-use restrictions" to prevent excavation of subsurface soils. ROD at 42, 51.

THAN performed the work required by the removal order, and, pursuant to several extensions of time granted by the Region, completed the removal activity on January 13, 1994. One month later it submitted its final report. *See* P. Ex. No. 3. On March 16, 1994, THAN filed this petition for reimbursement, and one week later, Region IV notified THAN by letter that it had satisfactorily completed the removal action required by the order.

C. Petition for Reimbursement

CERCLA § 106(b)(2)(D) allows a liable party to recover the reasonable costs of complying with an administrative order "to the extent that it can demonstrate, on the administrative record, that the [Agency's] decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." THAN's petition seeks reimbursement of $1,752,673, the alleged difference between the cost of removing only the "hot spots" as THAN proposed, and the cost of removing all subsurface soils with OC pesticide concentrations greater than 100 ppm, as the Region required. THAN claims it is entitled to reimbursement because the Region acted arbitrarily and capriciously when it rejected THAN's proposal and selected a subsurface soil cleanup level of 100 ppm. According to THAN, the administrative record, and in particular the correspondence

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[27](...continued)
groundwater protection standards. Therefore, no remediation is deemed necessary for the subsurface soils and no alternatives or cleanup goals are proposed for the remediation of subsurface soil." ROD at 30. Also, the results of the remedial investigation had not been fully reviewed and approved by the Region when it issued the removal cleanup order in March 1992, which is the subject of THAN's petition for reimbursement in this proceeding. *See supra* n.17 (RI submitted in February 1992).

between the OSC and ATSDR, does not support the selected cleanup level because it does not show how the 100 ppm level was selected. In contrast, THAN asserts, THAN's proposed cleanup was fully supported by computer modeling performed under the oversight of the Remedial Branch, and the Region acted arbitrarily and capriciously by rejecting THAN's proposal in favor of an unsupported cleanup level.

In response, the Region asserts that the OSC acted appropriately by surveying other removal actions with similar circumstances to determine a cleanup level, and by submitting its and THAN's proposed cleanup levels to ATSDR for review. Further, the Region maintains that the correspondence between the OSC and ATSDR supports the selected cleanup level. In addition, the Region relies upon two other documents for support. First, the Region states that an explanation of how the cleanup level was determined was provided in its April 27, 1992 response to THAN's comments on the order. The response to comments was added to the administrative record when the response was generated, which was after the order issued on March 30, 1992. The Region also relies upon the OSC's handwritten notes of his survey, which the Region claims were inadvertently omitted from the administrative record when the notes were generated. The Region corrected this oversight by adding them to the administrative record in March 1995 in connection with this proceeding. Lastly, the Region asserts that it did consider the data developed by THAN during the remedial process, but rejected THAN's proposal on the basis that neither the data nor THAN's conclusions had been finally approved as part of the remedial process.

THAN objects to the Region's attempt to rely upon the OSC's handwritten survey notes, arguing that 40 C.F.R. § 300.825, which regulates the establishment of the administrative record, prohibits adding the notes to the administrative record at this late date. (THAN does not, however, object to the Region's reliance upon the April 27, 1992 letter.) Even if the notes are included in the administrative record,

THAN argues that they do not support the selected cleanup leve l because there has been no showing that the cleanup levels at th e surveyed sites were properly determined, and there has been n o showing of the factual similarity between THAN's site and th e surveyed sites. In addition, THAN filed an amendment to its petition introducing recently obtained evidence showing that at another site, the Region selected a subsurface soil cleanup level greater than 100 pp m based upon site-specific data generated by a responsible party . According to THAN, this recently obtained evidence shows th e arbitrariness of the Region's decision not to rely upon THAN' s computer modeling results.

As framed by the parties, there are two main issues to b e resolved here: 1) what is included in the administrative record upo n which we must evaluate the merits of THAN's claim, and 2) whether there is any merit to THAN's claim that the Region acted arbitrarily and capriciously in selecting the 100 ppm subsurface soil cleanup level. For the reasons set forth below, we conclude that the OSC' s handwritten survey notes are part of the admin istrative record, and that THAN has not demonstrated, on the administrative record, that th e Region acted arbitrarily and capriciously in se lecting the removal action in the order.

II. ANALYSIS

A. Administrative Record

CERCLA provides that the Agency "shall establish a n administrative record upon which the [Agency] shall base the selection of a response action." CERCLA § 113(k)(1), 42 U.S.C. § 9613(k)(1) . One purpose of the administrative record is "to provide a basis for a reviewing tribunal to review the selection of a response action i n connection with reimbursement." *In re A&W Smelters and Refiners, Inc.*, CERCLA § 106(b) Petition Nos. 94-14 and 94-15, slip op. at 3 6

(EAB, Mar. 11, 1996). The regulations implementing the administrative record requirement can be found at 40 C.F.R. Part 300, Subpart I, entitled "Administrative Record for Selection of Response Action." 40 C.F.R. §§ 300.800-300.825. An administrative record typically includes "documents containing factual information, data and analysis relevant to the site and the release or threat of release; guidance documents, policies or other technical literature relevant to selecting a response action; documents received or made available as part of the public comment process, if any; decision documents, such as action memoranda; any enforcement orders pertaining to a site; and an index." *A&W Smelters & Refiners, Inc.*, slip op. at 36 (discussing the requirements of 40 C.F.R. § 300.810).

The index to the administrative record in this case indicates that it contains THAN's April 1990 preliminary remedial investigation report[28] and THAN's January 1992 feasibility study report.[29] The index also lists the correspondence between THAN and the Region pertaining to the proposed consent order for the removal action. In addition, the index lists the correspondence between the OSC and ATSDR regarding the latter's review of cleanup levels proposed for the removal action. The removal order itself is in the administrative record, as well as the correspondence between THAN and the Region with respect to the cleanup levels contained in the order. The administrative record also contains numerous Agency guidance

[28]THAN's February 1992 final remedial investigation report is not listed on the index.

[29]It is not clear if this document is a draft of the feasibility study THAN submitted to the Region on February 26, 1992. *See supra* n.17. In any event, the February 26, 1992 document is not reflected on the index to the administrative record.

documents.[30] Lastly, the administrative record contains the OSC's handwritten notes of his survey of cleanup levels at similar sites.[31] As noted above, these notes were inadvertently omitted from the administrative record when the notes were generated. The Region corrected this oversight by adding them to the record in March 1995 in connection with these proceedings.

THAN objects to the Region's reliance upon those handwritten notes in this proceeding, claiming that the notes cannot be added to the administrative record at this late date. THAN relies upon 40 C.F.R. § 300.825, which specifies only two circumstances for adding documents to an administrative record "after the decision document selecting the response has been signed:"

> (1) The documents concern a portion of a response action decision that the decision document does not address or reserves to be decided at a later date; or
>
> (2) An explanation of significant differences required by § 300.435(c), or an amended decision document is issued, in which case, the explanation of significant differences or amended decision document and all documents that form the basis for the decision to modify the response action shall be added to the administrative record file.

40 C.F.R. § 300.825(a)(1) and (2). According to THAN, neither of these circumstances exists here, and therefore the Region is precluded

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[30]The index for this portion of the administrative record is ten pages in length.

[31]The administrative record also includes materials not particularly relevant here, for example, the removal action work plan and correspondence between THAN and the Region about extending deadlines for the work.

from adding the notes to the administrative record and relying upo n them here.

The Region asserts that the regulatory provisions upon which THAN relies, quoted above, apply only to documents generated *after* a decision document is signed, and therefore do not apply to the OSC's notes, which were generated *before* the order was issued. The Region relies upon 40 C.F.R. § 300.820(b)(3), which pro vides that "[d]ocuments *generated* or received *after* the decision document is signed shall b e added to the administrative record file only as provided in § 300.825." 40 C.F.R. § 300.820(b)(3) (emphasis added). Thus, according to th e Region, section 300.825 applies only to documents generated o r received after a decision document is signed. The Region regards th e removal order issued to THAN as the decision document in this case, [32] and asserts that because the OSC's notes were generated before, no t after, the removal order was signed, they are not subject to sectio n 300.825 as THAN claims. Moreover, the Region maintains that it i s required to include the notes in the administrative record, as the notes were considered and relied upon in selecting the cleanup level.

We agree with the Region that the OSC's notes are properl y included in the administrative record. Section 300.800(a) requires the Agency to "establish an administrative record that contains th e documents that form the basis for the selection of a response action. " We agree with the Region that section 300.825, upon which THA N relies, applies only to documents generated or received after th e decision document selecting the response action has been signed. This conclusion is confirmed by the language of section 300.820(b)(3), upon which the Region relies, which provides that "[d]ocuments generate d or received after the decision document is signed shall be added to the

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[32]The preamble to the applicable regulations clearly anticipates that in removal actions the Agency's "decision document" may be something other than an action memorandum. *See* 55 Fed. Reg. at 8806, 8807.

administrative record file only as provided in §300.825." The Region has reasonably interpreted this language as implying that documents generated or received *before* a decision document is signed are not subject to section 300.825.[33] Consequently, because the OSC's notes were generated before the removal order was signed, section 300.825 does not, as THAN argues, preclude their addition to the record.

THAN argues that this interpretation of the regulations "directly contradicts the primary purpose of the administrative record (*i.e.*, to give the public an opportunity to obtain information concerning an EPA response action and to comment on that action) * * *." THAN's Comments on the Preliminary Decision at 7 (footnotes omitted). We disagree. THAN's argument assumes, incorrectly, that an administrative record must be completely assembled and made available for public comment before a decision document is signed. This assumption is incorrect because, at least with respect to time-critical removal actions, the regulations allow an administrative record to be compiled and made publicly available up to 60 days after on-site work commences, which presumably is after a decision document is signed. *See* 40 C.F.R. § 300.820(b)(1). Further, the argument overlooks well-settled principles of administrative law which, as discussed below, apply here and allow and administrative records to be supplemented to include documents upon which the decision-maker relied.

The Region's inclusion of the OSC's notes in the administrative record is consistent with general principles of administrative law. *See* 55 Fed. Reg. at 8807 (in responding to comments on proposed § 300.825, the Agency stated "EPA believes that including specific tenets of administrative law governing supplementing of the record in the

[33] *See also* 55 Fed. Reg. at 8800 (health assessments done by ATSDR would normally be included in administrative record, but not if assessment is generated by ATSDR after response is selected).

[regulations themselves] is unnecessary. These tenets apply to recor d review of response actions whether or not they are included in th e [regulations].").[34] We have previously noted that there are "generall y accepted exceptions to the administrative record rule" that allo w documents to be added to the record. *In re ASARCO Inc. and Federated Metals Corp.*, CERCLA § 106(b) Petition No. 94-22, slip op. at 3 9 (EAB, Apr. 17, 1996). One such exception is if "the record i s incomplete in that it does not contain documents considered by th e decision-maker." *United States v. Amtreco, Inc.*, 806 F. Supp. 1004, 1006 (M.D. Ga. 1992) (discussing supplementation of an administrativ e record under CERCLA). Pursuant to this exception, in *ASARCO Inc. and Federated Metals Corp.*, this Board supplemented an administrative record to include "three documents [that] were all in existence at th e time the Region established the * * * cleanup le vel and [that] the Region represents * * * it relied [upon] in selecting the * * * cleanup level. " *ASARCO Inc. and Federated Metals Corp.*, slip op. at 39. Plainly, th e circumstances here require the same result. The Region has stated that it relied upon the OSC's survey and his notes thereof in selecting the cleanup level for the removal action. THAN does not dispute this fact. Therefore, without the survey notes, the administrative record would be incomplete in that it would not contain documents considered and relied upon by the decision-maker. Consequently, the Region' s

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[34]These principles have been applied by federal courts in connection with determining whether documents can be considered part of an administrative record for the purpose of reviewing the selection of a response action under CERCLA § 113(j)(1), which provides that "[o]therwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court." *See, e.g., Elf Atochem North America, Inc. v. United States*, 882 F. Supp. 1499 (E.D. Pa. 1995); *United States v. Princeton Gamma-Tech, Inc.*, 817 F. Supp. 488 (D.N.J. 1993), *rev'd and remanded on other grounds* 31 F.3d 138 (3rd Cir. 1994); *United States v. Amtreco, Inc.*, 806 F. Supp. 1004 (M.D. Ga. 1992). Although the Board is not a court, and therefore CERCLA § 113(j) is not directly applicable to us, it makes practical sense for us to consider documents that a court would consider in its review of the Agency's action.

supplementation of the administrative record to include the OSC's notes was consistent with our previous decision in *ASARCO Inc. and Federated Metals Corp.* and with the generally accepted principles of administrative law governing supplementation of administrative records.

B. Selection of Subsurface Soil Cleanup Level

The main issue raised in THAN's petition is whether the Region arbitrarily and capriciously selected the subsurface soil cleanup level in the order.[35] We conclude that it did not.

THAN contends that the Region acted arbitrarily and capriciously for the following reasons. According to THAN, the administrative record is "silent with respect to how the Removal Branch selected its cleanup levels for the THAN property." Petition for Reimbursement of Costs at 31. THAN maintains that only two documents in the administrative record discuss the cleanup level--the OSC's request for ATSDR review and ATSDR's response--and that neither provides a basis for the selected level. *Id.* at 32-33. In particular, THAN argues that the ATSDR response does not support the selected cleanup level because ATSDR did not accurately understand the site or THAN's proposal. For example, THAN states that ATSDR considered the possibility that the site could have residential or day care uses in the future, even though at that time THAN had proposed institutional controls (deed restrictions) to prohibit such uses. Memorandum in Reply to EPA's Memorandum in

[35]The Region does not argue that the merits of THAN's petition cannot be considered because THAN has failed to satisfy the statutory prerequisites to filing a petition. *See Employers Insurance of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995) (failure to satisfy a prerequisite justifies denial of petition without consideration of merits), *cert. denied* 116 U.S. 699 (1996); *In re Findley Adhesives, Inc.*, CERCLA § 106(b) Petition No. 94-10 (EAB, Feb. 10, 1995) (same).

Opposition to Petition for Reimbursement of Costs ("THAN Memorandum") at 14. THAN also notes that the ATSDR checked a box marked "remedial action" instead of one marked "removal action" on its response, thus indicating a lack of familiarity with the site and the proposed activity. *Id.* at 15. Further, THAN argues that ATSDR did not understand THAN's cleanup proposal, as evidenced by ATSDR's failure to mention any "hot spots" in its report. *Id.* at 15.

THAN also asserts that the OSC's survey, as evidenced by the survey notes, does not provide a basis for the selected cleanup level. According to THAN, the survey is "flawed and based on faulty assumptions." *Id.* at 9. For example, THAN asserts that the Region has failed to show that the cleanup levels for the surveyed sites were properly selected. *Id.* In addition, THAN claims that the Region has not shown that the OSC was sufficiently familiar with the surveyed sites to conclude that THAN's site should be treated similarly. *Id.*

THAN also claims that the Region acted arbitrarily and capriciously in failing to consider the site-specific risk-based data THAN produced through computer modeling performed under the oversight of the Remedial Branch. THAN argues that:

> [T]he Removal Branch inserted itself into the remedial process (by assuming that no further soil cleanup would be conducted after the Removal Action), and without considering any site-specific data whatsoever, unilaterally imposed cleanup standards on Petitioner that went far beyond what the Remedial Branch would likely have selected. It is therefore Petitioner's contention that if the Removal Branch chooses to perform a remedial function, it must at least be required to give consideration to data developed during the Remedial Investigation.

Id. at 13. To support its position that the Region acted arbitrarily and capriciously in rejecting THAN's proposal to excavate only the "hot spots" revealed by the computer modeling, THAN points to language in the ROD supposedly confirming THAN's computer modeling results:

> The PESTAN modeling, coupled with the results of the subsurface soil investigation performed during the RI, indicate that the subsurface soils on the western parcel would not contribute to groundwater contamination at concentrations exceeding the groundwater protection standards. Therefore, no remediation is deemed necessary for the subsurface soils and no alternatives or cleanup goals are proposed for the remediation of subsurface soil.

ROD at 30. Further, THAN claims that in establishing a cleanup level in another removal action, Region IV did consider site-specific risk-based data compiled by a responsible party, thus demonstrating the arbitrariness of the Region's actions here. With this background we now turn to a brief discussion of the scope of our review of the Region's decision before resuming the discussion of THAN's claims.

CERCLA § 106(b)(2)(D) allows reimbursement only if a petitioner demonstrates, on the administrative record, that the decision in selecting the challenged response action was arbitrary and capricious or otherwise not in accordance with law. This scope of review is very narrow. *In re William H. Oliver*, CERCLA § 106(b) Petition No. 94-8, slip op. at 23 n.40 (EAB, July 5, 1995). "To be upheld, a decision to select a response action need not be the 'right' one." *A&W Smelters & Refiners, Inc.*, slip op. at 38 (quoting *Elf Atochem North America, Inc. v. United States*, 882 F. Supp. 1499, 1502 (E.D. Pa. 1995)). In other words, under this standard, the critical determination is *not* whether the Region selected the best possible response, or whether another response

would also have been an acceptable selection; it is merely whether the Region acted arbitrarily in making its selection. *See United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985) (the central focus of the "arbitrary and capricious" standard is on the rationality of the agency's decision making, rather than on its actual decision).

Moreover, under section 106(b)(2)(D) of CERCLA, it is the petitioner who bears the burden of demonstrating that the Agency acted arbitrarily and capriciously. *William H. Oliver*, slip op. at 22-23. Given the highly deferential nature of the "arbitrary and capricious" standard, we conclude that THAN has failed to meet this burden.

There is no merit to THAN's claim that the administrative record fails to show how the subsurface soil cleanup level was derived. Reading the administrative record as a whole, and in particular the Region's step-by-step description of its selection in its April 27, 1992 response to THAN's comments on the order, the following facts emerge. THAN approached the Region with a proposal to perform part of a long-term remedy--soil excavation and disposal--immediately, as a removal action, in order to take advantage of a method of disposal, landfilling, that appeared to be available for a short time only. THAN stated that its proposed removal would "eliminate" the soil contamination, thus indicating that THAN contemplated no further response action with respect to the surface and subsurface soils after the removal action. With respect to subsurface soils, THAN proposed excavating only the "hot spots" revealed by the computer modeling results THAN obtained under the oversight of the Remedial Branch. At that time, however, the modeling results were tentative and preliminary in that they had not been subject to scrutiny by the Agency and the public, and had not been finally approved by the Agency.

The Removal Branch concluded that THAN's propose d removal action was time-critical,[36] and, considering THAN's desire to accomplish the removal action before the expiration of the varianc e which would allow the landfilling of the contaminated subsurface soil, there was no time for the Agency to review and approve the modeling results upon which THAN relies. Instead, the Region surveyed other removal actions within the Region that, in the Region's expertise , involved subsurface soil contaminated by pollutants like the ones o n THAN's property. Based upon this survey, the Region determine d that a 100 ppm subsurface soil cleanup level for this removal actio n would protect human health an d the environment, particularly as both THAN and the Region contemplated that the removal would be th e final response action with respect to the soil.

Then, the Region asked ATSDR to eval uate both THAN's and the Region's cleanup proposals. With respect to subsurface soil, th e Region's request to ATSDR noted that THAN's proposal was base d upon sampling done at depths greater than five feet below land surface, and that no data were available for soils at depths of one to five feet . ATSDR responded to the Region's request, and concurred with th e Region's recommended cleanup levels. A TSDR explained that without data for the soils one to five feet below land surface there is no way to be sure that THAN's proposal meets the statutory requirement o f protecting human health and welfare and the en vironment. In contrast,

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[36] *See supra* n.20. We have accepted the characterization of this removal action as "time-critical." THAN has not challenged this characterization. Instead, THAN has merely asserted that there is no documentation in the administrative record reflecting this designation. THAN's Comments on Preliminary Decision at 7 n.2. This alleged defect in the administrative record is not relevant here, however, as THAN makes no argument that the selected response action would have been different had the removal not been deemed "time-critical." Further, given THAN's desire to complete this removal action two and one-half months after it proposed it (before the expiration of the national capacity variance), we find it highly unlikely that THAN ever contemplated an objection to the Region's treatment of the removal as "time-critical."

ATSDR determined that the Region's proposed 100 ppm cleanup level for subsurface soil would be adequately protective if the site is used for industrial purposes, residential purposes, or commercial purposes, including a day-care center. Accordingly, the Region selected the 100 ppm level over THAN's proposal.

Plainly, it can hardly be said that the administrative record is silent with respect to how the subsurface soil cleanup level was selected. When read in its entirety, the administrative record provides a chronological and factual explanation of how THAN selected its proposed subsurface soil cleanup level, how the Region selected its proposed level, and on what basis the Region selected its proposal over THAN's. The record provides a rational connection between the choice made by the Region and the information available to it at that time. *See Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (agency need only provide an explanation that enables the reviewing authority to evaluate the agency's rationale at the time of the decision, and that explanation need not be a "model of analytical precision" to survive a challenge under the arbitrary and capricious standard). THAN's contention that the administrative record is silent as to how the challenged cleanup level was determined is accordingly rejected.

We turn now to THAN's more specific claims concerning the alleged arbitrariness of the Region's selection of the subsurface soil cleanup level. First, we address THAN's contention that the ATSDR report fails to support the cleanup level. Contrary to THAN's assertions, we find no basis to conclude that ATSDR misunderstood either THAN's proposal or the nature of the site. THAN asserts that ATSDR erroneously considered a future residential or day-care use for the site, even though THAN had proposed deed restrictions to prohibit such uses as part of the final remedy for the site. In other words, THAN argues that ATSDR should not have considered a future residential or day-care use for the site because, at the time of ATSDR's

evaluation, THAN had proposed to prohibit such uses. We reject this argument. At the time of its evaluation, even if ATSDR were aware of the deed restrictions THAN proposed as part of the remedial process, ATSDR had no way of knowing whether that proposal, made in connection with the process of selecting a final remedy for the site, would ultimately be adopted in the ROD. Likewise, neither did the OSC. Accordingly, the Region did not act arbitrarily or with caprice when it relied upon a report that considered future uses for the property that, at the time the report was prepared, had not been foreclosed. Moreover, ATSDR's approval of the 100 ppm subsurface soil cleanup level was not based solely on the possibility of the site's future day-care or residential use. ATSDR also concluded that the Region's proposal would be protective of human health if the site were used in the future for industrial or other commercial uses; however, it could not determine, based on available data, whether the THAN proposal would be protective. The ATSDR was concerned about the absence of sampling data at depths of one to five feet, which is where subsurface soils might be brought to the surface in connection with any future construction activity, such as excavation of subsurface soils for installation of utility lines. The ATSDR stated:

> ATSDR recommends sampling be performed at the currently unsampled depth of 1 to 5 feet. Until OCP concentrations at this soil depth are known, ATSDR cannot determine whether the PRP's remediation plan is protective of human health. In [the] future the soil may be disturbed by such activities as construction onsite or laying utility lines through the site * * *. Then, unknown concentrations of OCP may be brought to the surface for direct contact exposure. Onsite workers could also be exposed to soil containing unknown concentrations of OCP.

P. Ex. No. 24 at 2.

We also find no merit in THAN's argument that the Regio n acted arbitrarily in relying upon the ATSDR report because ATSD R checked the wrong site status box on its report form, thu s demonstrating the report's unreliability. Under the "Site Status " heading, the report shows a mark next to "remedial" instead o f "removal." As explained above, the site was in the middle of th e remedial process when this removal action commenced, and hence this mark on the form does not reflect the deep misunderstanding THAN attributes to it. Further, the report itself refers to the "EPA proposed *removal* action levels," P. Ex. No. 24 at 2 (emphasis added), indicating ATSDR's awareness that a removal action was the subject of its review. In addition, the OSC made it abundantly clear that he was requesting an evaluation of cleanup levels for a removal action.[37] Thus, we find the error alleged by THAN to be of no consequence to the reliability of the report.

Also without merit is THAN's ar gument that ATSDR did not understand fully the nature of THAN's proposal as evidenced by the report's failure to discuss "hot spots." The OSC's memorandu m requesting ATSDR review made cle ar the nature of THAN's proposal, and indeed, indicated that "T HAN will be excavating 'hotspots' where significant contamination was found in deeper soil samples." P. Ex . No. 23. Given the clarity of the OSC's request, we have no objective reason to conclude that the ATSDR misunderstood THAN's proposal. THAN has failed to persuade us that the Region acted arbitrarily and capriciously by relying upon ATSDR's report.

THAN next attempts to show that the Region's decision i s arbitrary by claiming that the OSC's survey of subsurface soil cleanup levels at other similar sites was "flawed and based on fault y

[37] *See* P. Ex. No. 23 (memorandum requesting comment on proposed "removal action levels" for "proposed removal action at the T H Agriculture and Nutrition Site in Albany, Georgia").

assumptions." THAN Memorandum at 9. Specifically, THAN argues that the *Region* failed to show that the cleanup levels for the surveyed sites were properly selected. In addition, THAN argues, the *Region* failed to show that the OSC was sufficiently familiar with the surveyed sites to conclude that THAN's site should be treated similarly. Contrary to THAN's assertions, the Region's selection of a cleanup level enjoys a presumption of correctness under the arbitrary and capricious standard. *Natural Resources Defense Counsel v. U.S. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993). It is not the *Region* who bears the burden in these proceedings to show that it acted without caprice. Instead, it is *THAN's* burden to prove that the Region acted with caprice. Therefore, if the actions of the OSC, which appear to be regular on their face, were somehow defective, it is THAN's burden to show that such a defect exists.

In its comments on the Preliminary Decision, THAN attempts to make such a showing.[38] THAN argues that of the six surveyed sites, only two were on the NPL at the time the survey was conducted, and therefore only those two should have been used. According to THAN, the four non-NPL sites are not comparable to THAN's site and therefore should not have been considered because they "were presumably subject only to removal actions, with no expectation that the Remedial Branch would revisit the sites after the removal actions and require further cleanup pursuant to a Record of Decision." THAN's Comments on Preliminary Decision at 12. These objections fail to show, however, how limiting the survey to only the two NPL sites would have suggested a cleanup level different than the one challenged here. First, it is difficult to see how including the four non-

[38]The Board is considering this argument, despite the fact that it was not raised until THAN filed its comments on the Preliminary Decision, due to the unique circumstances involved here; namely, the notes reflecting the Region's survey were not available to THAN as a part of the administrative record underlying this response action until March 1995, after the petition for reimbursement had already been filed.

NPL sites adversely affected THAN. The cleanup levels at the NP L sites were the same as or more stringent than the levels for the non - NPL sites; therefore, inclusion of the four non-NPL sites woul d presumably produce a less stringent cleanup level than would resul t from using the NPL sites alone. Second, THAN has failed to sho w that the Region acted improperly by considering the four non-NP L sites by reason of the fact that they were subject to removal activit y only, not ongoing remedial activity. At the heart of THAN' s objection is an assumption that "the Remedial Branch had the express authority to establish the final cle anup levels for the Site," *id.* at 13, and that the Remedial Branch wo uld determine the final cleanup level after the removal action. THAN's reasoning is nothing more than a restatement of its argument, discussed below, that the Removal Branch should have deferred to the Remedial Branch in establishing a cleanup level for this site. As discussed below, this reasoning is unpersuasive. Throughout this process THAN had been clearly advised by th e Region that the Removal Branch had the authority to establish cleanup levels for THAN's requested removal, and had been warned by th e Region that the removal levels may not "correlate" with (*i.e.*, may be more *or* less stringent than) what the remedial process might ultimately produce at its conclusion. Moreover, THAN's representations that it thought further remedial soil cleanup would be required after th e removal are contradicted by its statement to the Region that it s proposed removal would *eliminate* soil contamination. Based upon this statement, the Region did not act arbitrarily in surveying other removal sites where no further soil cleanup was contemplated under th e remedial process.

Lastly, THAN contends that the Region acted arbitrarily i n failing to consider site-specific risk-based data generated by THAN' s computer modeling performed under the oversight of the Remedia l Branch and which allegedly supported THAN's proposal to clean up only the "hot spots." To the contrary, the Region did consider thes e data. To "consider" means to take into account and to think abou t

carefully. It does not mean to "accept." In selecting the subsurface soil cleanup level, the Region considered THAN's data, and chose not to rely upon them for two reasons. First, the Region determined that the computer modeling data were preliminary and tentative in that they had not been through the rigorous public review and Agency approval procedures that are part of the remedial process. As explained by the Region, "[t]he obvious interest which [liable parties] have in limiting costs justifies EPA reluctance to rely upon [a liable party's] remedial cleanup proposals until they have been fully reviewed." Supplemental Memorandum in Opposition to Petition for Reimbursement of Costs ("Supplemental Memorandum") at 8. The Region concluded that a survey of sites deemed similar under the Region's expertise would provide a sounder basis for a decision than an untested proposal by a liable party interested in limiting its costs. *Id.* Secondly, ATSDR found the data lacking for the purposes of selecting a cleanup level for subsurface soils involved here, as there were no data for soil at depths of one to five feet below the surface. The Region has articulated reasonable and plausible justifications for deciding not to rely upon THAN's computer modeling data, and THAN has not demonstrated any flaw in these justifications. Accordingly, THAN's argument is unpersuasive. *See ASARCO, Inc. and Federated Metals Corp.*, slip op. at 37.

In our view, THAN's real objection is that the cleanup level selected by the Region's Removal Branch is, in THAN's opinion, more stringent than what the Remedial Branch would have selected in the ROD. For example, THAN claims that "the Removal Branch inserted itself into the remedial process (by assuming that no further soil cleanup would be conducted after the Removal Action), and without considering any site-specific data whatsoever, unilaterally imposed cleanup standards on [THAN] that went far beyond what the Remedial Branch would likely have selected." THAN Memorandum at 13. THAN's criticism of the Removal Branch is unwarranted. As explained above, the Removal Branch did in fact consider THAN's site-

specific data (the computer modeling results). Further, the Removal Branch did not "insert" itself into this process; *THAN* asked for the removal action. The Removal Branch did not assume on its own initiative that no further soil cleanup would be conducted after the removal activity; *THAN* stated that its proposed removal would "eliminate" the contaminated soil.

THAN's argument reflects disappointment about the outcome of a strategic decision made by THAN. By seeking to perform part of the remedial activity as a removal action, THAN deliberately made a tradeoff between immediate action and thorough study, and cannot now be heard to protest that choice. THAN was fully warned of the risk it was taking in seeking to eliminate the contaminated soil by a removal action instead of waiting for the remedial action to run its course:

> The removal action is being done at *THAN's risk. No guarantee is being granted from EPA that the removal cleanup levels will correlate with the remedial cleanup levels* since such remedial cleanup standards will not be determined until a ROD is signed concerning the soils operable unit for the Site.

P. Ex. No. 8 at 2-3 (emphasis added). The highlighted language above clearly contemplates that implementing the removal cleanup levels may be *more* stringent than implementing the final remedial cleanup levels, a possibility THAN ignored at its own peril. [39]

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[39] *See supra* section I.B ("Factual Background"). For the most part, the parties' respective discussions of the facts seem to assume that implementing the removal cleanup level for subsurface soils was a more stringent response action than the final cleanup remedy. Nevertheless, in its response to THAN's petition, the Region specifically denies that the costs THAN is seeking in its reimbursement petition are (continued...)

Moreover, CERCLA § 104 (a)(2) explicitly requires the use of removal actions to contribute to the efficient performance of remedial actions, providing that "[a]ny removal action undertaken by the [Agency] under this subsection * * * should, to the extent the [Agency] deems practicable, contribute to the efficient performance of any long term remedial action with respect to the release or threatened release concerned." 42 U.S.C. § 9604(a)(2). EPA guidance implementing this statutory directive provides that removal actions should be designed to avoid wasteful, repetitive, short-term, inefficient activities. In particular:

> The *major* objective of this requirement is to provide maximum protection of public health and the environment at minimal cost by avoidance of removal restarts. The focus of this provision is on avoidance of restarts that are due to *recurring threats that were not adequately abated in the original removal action* and threats from deteriorating site conditions that should have been foreseen.

OSWER, Guidance on Implementation of the "Contribute to Remedial Performance" Provision at 1 (OSWER Directive No. 9360.0-13, Apr. 3, 1987) (emphasis added). Further:

> With regard to cleanup standards, this provision does not compel the removal program to lower its cleanup standards. Rather, the purpose of this provision is to

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[39](...continued)
"attributable to EPA's subsurface action level." Region's Memorandum in Opposition at 4, n.2. We do not reach the question of whether the removal response was in fact more stringent than the remedial remedy, for we conclude that the removal response was not arbitrary and capricious irrespective of its stringency vis-a-vis the remedial response.

> improve the design of removal actions, such that after cleanup standards are establishe d for a removal site, the *chosen removal action will address those substances targeted for cleanup in a manner that avoids the need for removal restarts.*

Id. at 4. Here, the Region acted consiste ntly with this guidance. At the time the Region issued the order, the possibility existed that th e remedial process would have produced a more stringent cleanup level for the subsurface soils than that proposed by T HAN. Rather than risk such a "removal restart," namely, the need for a subsequent soi l excavation and disposal requirement, the Region s elected a cleanup level that was intended to avoid this possibil ity while achieving the statutory objective of protecting health and the environment.

Our analysis is not changed by the fact that the ROD contains language arguably confirming THAN's computer modeling result s underlying THAN's proposed cleanup level. *See* ROD at 30. The arbitrary and capricious st andard is not based upon hindsight. *See, e.g.*, *MacLeod v. ICC*, 54 F.3d 888, 892 (D.C. Cir. 1995) ("An agency' s decision is not arbitrary or capricious *merely* because it is not followed in a later adjudication.") (emphas is added); *New York State Commission on Cable Television v. FCC*, 749 F.2d 804, 813 (D.C. Cir. 1984) (th e proper inquiry is "whether a reasonable person, *considering the matter on the agency's table*, could arrive at the judgment the agency made") (emphasis added). The fact that uncertainty surrounded the ultimat e remedial cleanup level is captured in a comment ventured by THAN immediately after the Region issued the order. THAN postulated that the cleanup level selected for the removal was "likely" more stringent than the cleanup level the Remedial Branch woul d have selected had the removal action not been proposed. P. Ex. No. 12 at 6 (Letter fro m James D. Levine, Counsel to THAN to Greer C. Tidwell, Regiona l Administrator, Region IV (Apr. 6, 1992)). By employing the wor d "likely," THAN implicitly acknowledged the speculative aspect o f

forecasting the ultimate remedial cleanup level; in other words, THAN's comment illustrated the obvious, namely, that until the Remedial Branch completed its deliberations, there was no way to be certain that the removal cleanup level would correspond with the remedial cleanup level, or to what extent. At the time the Region issued the unilateral administrative order, it of course did not have the benefit of a completed remedial process. (Indeed, the ROD was not issued until more than one year after the order.) Instead, the Region utilized the information it had at that time, and based upon that information made a determination that THAN has not demonstrated to be arbitrary or capricious. We agree with the Region's response to THAN's objections to the order:

> Because of the time constraints brought on by the expiration of the national capacity variance, THAN has attempted to obtain from EPA a premature determination of subsurface clean-up levels that will be established in the ROD. In effect, THAN has asked the [Remedial Branch] to forecast the ROD so that THAN can limit the cost of soil disposal. The [Remedial Branch] has refused to forecast the soil cleanup level, and the OSC is responsible for establishing a cleanup level for the removal which is protective. The OSC has acted in a manner wholly consistent with EPA policy in arriving at the cleanup level.

P. Ex. No. 13 at 3-4.

Nor does the "new evidence" submitted in THAN's amendment to its petition change our conclusion. As noted above in the Background section, THAN's "amendment" presents recently obtained evidence that it contends demonstrates the arbitrariness in the Region's decision not to base a subsurface soil cleanup level on

THAN's computer modeling results. The new information relied upon by THAN involves the Valley Chemical Site in Mississippi (also in Region IV), which was used as agricultural pesticide formulation and distribution facility and which contained soil contamination similar to THAN's. According to THAN, the order issued in connection with the Valley Chemical Site contained a subsurface soil cleanup level that was based upon site-specific risk-based data submitted to the Region by the liable parties. THAN argues that "the selection and approval process for soil cleanup levels at the Valley Chemical Site provides compelling and undeniable evidence that EPA can and will consider risk-based cleanup levels in the context of a removal action." Amendment to Petition for Reimbursement of Costs at 7. The problem with THAN's argument, however, is that it overlooks the fact that the selection of the cleanup levels for the Valley Chemical Site occurred two years after Region IV issued the cleanup order to THAN.[40] The matter before us now is concerned with how the Region selected cleanup levels for an order issued in March 1992; what the Region did two years later is not relevant, regardless of the alleged similarities between the two sites. *See ASARCO Inc. and Federated Metals Corp.*, slip op. at 34 (an Agency guidance document issued subsequent to the issuance of a cleanup order is irrelevant in judging the selection of the cleanup level contained in the order). An alternative basis for reaching the same conclusion is that the information relied upon by THAN is not contained in the administrative record upon which we are statutorily required to base our evaluation of the Region's selection. Nor does this information fit into any of the recognized circumstances for supplementing an administrative record referred to above in section II.A. For these reasons, we reject the arguments raised in THAN's amendment to its petition.

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[40]The Valley Chemical Site order issued on March 1, 1994. Amendment to Petition for Reimbursement of Costs at 9.

III. CONCLUSION

Based on the foregoing, the Board concludes that THAN has not demonstrated that Region IV acted arbitrarily and capriciously or otherwise not in accordance with law when the Region issued a unilateral administrative order requiring THAN to remove subsurface soil containing 100 ppm or greater of organochlorine pesticides from a site owned by THAN in Albany, Georgia. Accordingly, THAN's petition for reimbursement must be denied.

So ordered.